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No. 90-1127

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, FOX RIVER VALLEY RAILROAD CORPORATION, ITEL CORPORATION, ITEL RAIL CORPORATION, CSX TRANSPORTATION, INC., AND BUFFALO & PITTSBURGH RAILROAD, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the court below correctly upheld the decisions of the Interstate Commerce Commission allowing newly formed noncarrier companies to acquire railroad lines under the agency's class exemption applicable to railroad line acquisitions, pursuant to 49 U.S.C. 10901, upon the ICC's finding, based upon the evidence of record, that, notwithstanding affiliation of the companies with railroad holding companies, they were financially and operationally independent of them.

2. Whether the court below correctly upheld the decisions of the Interstate Commerce Commission in which it concluded that the sellers of the railroad lines were not involved in the transactions by which the control relationships between the companies that had acquired the railroad lines and their corporate parents were approved, pursuant to an exemption from the requirements of 49 U.S.C. 11343, and that the sellers' employees were unaffected by the authorized control transactions.

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The private respondents, Chicago and North Western Transportation Company, Fox River Valley Railroad Corporation, Itel Corporation and Itel Rail Corporation, intervenors in Nos. 88-1793 and 89-1183 before the court below, and CSX Transportation, Inc., and Buffalo & Pittsburgh Railroad, Inc., intervenors in No. 89-1436 before the court below, pursuant to

Rule 15 of the Rules of this Court, submit this brief in opposition to the petition for a writ of certiorari herein.

STATEMENT OF THE CASE

The Fox River Valley line

Chicago and North Western Transportation Company ("CNW"),[1] as part of its continuing effort to dispose of marginally profitable railroad lines,[2] proposed to sell 208 miles of railroad line between Green Bay and Milwaukee, Wisconsin, in the Fox River Valley. Fox River Valley Railroad Corporation (formerly FRVR Corporation and hereafter referred to as "FRVR"),[3] a newly organized corporation, which at the time was neither a railroad nor a person in control of a railroad, agreed to purchase the properties for some $61 million.

Availing itself of the class exemption previously promulgated by the Interstate Commerce Commission ("ICC"),[4] FRVR, joined by CNW, filed a Notice of Exemption to acquire the CNW line, effective De-

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[1] CNW's parent and nonwholly owned subsidiaries are identified in Appendix A to this brief.

[2] *See generally, Hayfield Northern R. Co. v. Chicago & N.W. Tr. Co*, 467 U.S. 622 (1984); *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile*, 450 U.S. 311 (1981).

[3] FRVR is a wholly-owned subsidiary of Itel Rail Corporation ("Itel Rail"), which, in turn, is controlled by Itel Corporation ("Itel"). Itel Rail controls, among other companies, the Green Bay and Western Railroad Company and three other short-line railroads. *See* Appendix A to this brief.

[4] *Class Exemption—Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985), *review denied, Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (list).

cember 30, 1987.[5] The ICC, as in other acquisition exemption proceedings, did not attach employee protective conditions, but invited the Railway Labor Executives' Association ("RLEA") to introduce evidence as to why employee protective conditions would be warranted.[6] RLEA did not respond but, rather, sought the revocation of the exemption, alleging, among other things, that FRVR was nothing more than the alter ego of its parent and that, therefore, the purchase of CNW properties was subject to 49 U.S.C. 11343(a) and the mandatory imposition of employee protective conditions, as provided in 49 U.S.C. 11347.

The Commission disagreed, and the court below sustained its determination. The Commission, based on the evidence of record before it, found that FRVR had been established for legitimate business reasons, including its assumption of the risks associated with operation of facilities that had proven unprofitable for CNW (App. 11a, 46a-47a), and that, while Itel Rail had contributed $14 million of equity to FRVR and Itel and Itel Rail had guaranteed a loan necessary to consummate the acquisition, FRVR otherwise was financially and operationally independent of its corpo-

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[5] Finance Docket No. 31205, *FRVR Corporation—Exemption Acquisition and Operation—Certain Lines of Chicago and North Western Transportation Company* (unreported), served January 11, 1988, 53 *Fed. Reg.* 647. CNW successfully brought an action to bar its employees from striking to block consummation of the sale. *Chicago and North Western Transp. Co. v. RLEA*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988).

[6] Unreported decision, served January 29, 1988, *set aside on other grounds, Railway Labor Executives' Ass'n v. ICC*, 861 F.2d 1083, (8th Cir. 1988), *aff'd*, 888 F.2d 1227 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1808 (1990).

rate affiliates (App. 11a, 48a). The evidence, the ICC found, did not compromise FRVR's separate identity or detract from the independence of its operations. Accordingly, FRVR's purchase of CNW's railroad line was properly processed under the ICC's acquisition exemption procedures (App. 12a, 49a). The court below, at App. 18a, said, "In the instant case . . . we . . . conclude that, as FRVR met the test of independence and was formed for reasons that are both legitimate and substantial, the ICC could reasonably determine that it was a non-carrier for purposes of section 10901."

Since FRVR by its purchase of CNW's railroad line would itself become a railroad, Itel and Itel Rail sought and secured ICC approval of their control of FRVR, subject to section 11347 employee protective conditions.[7] RLEA sought clarification or reconsideration of the ICC's decision, contending that under the statute, the protection ordered by the ICC as a condition to its approval of the control transaction must be extended to any CNW employees affected by CNW's sale of its railroad line to FRVR, notwithstanding that CNW was not a party to the control transaction.

Again, the ICC disagreed with the RLEA's contention, and the court below affirmed its holding. The fact that CNW was the seller of the railroad line, the ICC found, did not make it a party to the transaction in which the control relationship between FRVR and its corporate parents was approved; CNW's employ-

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[7] Finance Docket No. 31206, *Itel Rail Corp. and Itel Corp.—Cont. in Control Exempt.—FRVR Corp.* (unreported), served February 5, 1988.

ees were unaffected by the section 11343 transaction (App. 9a-10a, 23a-24a). The ICC noted that it uniformly has held that mandatory employee protective conditions extend only to employees of the applicant railroads and that the United States courts of appeals consistently have sustained its construction of the statute; nothing of record compelled a contrary result (*id.*).

The B&P line

CSX Transportation, Inc. ("CSXT"),[8] offered to sell its marginally profitable 369-mile line between Buffalo, New York, and Eidenau, Pennsylvania, to the Buffalo & Pittsburgh Railroad, Inc. ("B&P"),[9] a newly organized corporation, jointly controlled by two unrelated entities, Genesee & Wyoming Industries, Inc.,[10] and the Arthur T. Walker Estate Corporation.[11] B&P proposed to finance the railroad line's $28.5 million purchase price with the proceeds of a bank loan secured by the assets being purchased. To help secure the bank loan, B&P's two corporate parents agreed to pledge their B&P stock to the bank in the event B&P defaulted on its loan obligations. B&P's initial capitalization consisted of an aggregate $4 million capital contribution from its parents in return for their B&P stock (App. 56a-57a).

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[8] CSXT's parent and nonwholly owned subsidiaries are identified in Appendix A to this Brief.

[9] B&P controls the Allegheny and Western Railway Company and the Clearfield and Mahoning Railroad Company.

[10] Genesee & Wyoming Industries, Inc., has several wholly-owned short-line railroad subsidiaries.

[11] The Arthur T. Walker Estate Corporation, which controls a railroad, is controlled by Dumaines, a New Hampshire trust, which also controls a railroad.

B&P filed a Notice of Exemption under the same section 10901 class exemption invoked by FRVR in its purchase of the CNW's railroad line. Consistent with the ICC's practice, the exemption became effective without protective conditions being imposed for the employees of either the B&P or CSXT (App. 54a-55a).

B&P's parents, which following the B&P's railroad line acquisition would be in control of an additional carrier, petitioned the ICC for an exemption from the requirements of 49 U.S.C. 11343. CSXT took no part in that proceeding. The ICC granted the exemption petition and, as required by 49 U.S.C. 11347, imposed employee protective conditions, limited, however, to the employees of B&P and its parents but not to those of CSXT (App. 68a-70a).

RLEA and the United Transportation Union ("UTU") sought revocation of the exemption in both the proceeding allowing B&P's acquisition of CSXT's railroad line and the proceeding approving the control relationship between B&P and its two corporate parents. With respect to the former, RLEA and UTU argued that the acquisition should have been governed by section 11343, principally because B&P would connect with short-line railroads already controlled by its parents and, furthermore, because its parents had guaranteed B&P's financial obligations (App. 63a-64a). The ICC disagreed, finding that its parents had not guaranteed B&P's financial and contractual obligations and that there were sufficient other indicia of B&P's independence to justify treating the acquisition under the section 10901 class exemption procedure (App. 65a-66a). As for the proceeding approving the control relationships between the B&P and its par-

ents, RLEA and UTU argued that, because the sale by CSXT of its railroad line to the B&P made the transaction necessary, CSXT was "involved" in the proceeding, and CSXT's employees, therefore, were entitled to the protective conditions attached to the ICC's approval of the transaction (App. 68a). The ICC rejected the argument in favor of its long standing and judicially approved construction of section 11347 as requiring the imposition of protective conditions only for the employees of the railroads which were the applicants in the control proceeding (App. 68a-70a).

RLEA petitioned the court below for review of the ICC's decision, advancing essentially the same arguments it had in the case involving the Fox River Valley line. The court below summarily denied the petition in light of its decision in that case (App. 52a-53a).

SUMMARY OF ARGUMENT

This case does not warrant the granting of the petition for a writ of certiorari. The decisions of the court below are in total accord with those of the several United States courts of appeals that have addressed either of the two matters in issue. The courts uniformly have been in agreement that a newly organized company, as FRVR and B&P were, can avail itself of the section 10901 class exemption procedures when purchasing a railroad line, notwithstanding that the acquiring company may be an affiliate of a railroad holding company. The courts have been in agreement, as well, that section 11347 protective conditions are mandated only for the affected employees of the railroads that are participants in a section 11343

transaction. Indeed, the petitioners do not even allege a conflict with the decisions of other United States courts of appeals.

The petitioners' claim that the decisions of the court below conflict with applicable decisions of this Court is palpably contrived; it fails to withstand rudimentary analysis. None of the decisions relied on by the petitioners dealt with the issue whether a noncarrier affiliate of a railroad holding company can acquire a railroad line pursuant to section 10901, rather than section 11343, and none dealt with the need for imposing section 11347 employee protective conditions in transactions subject to the ICC's approval under section 11343. At best, the decisions relied upon by the petitioners underscore the breadth of the ICC's jurisdiction to oversee carrier mergers and acquisitions, a matter as to which the decisions below pose no challenge.

The ICC reasonably applied the statutory provisions to facts supported by substantial evidence. The court below correctly accorded such decisions the deference they were due.

ARGUMENT

I.

The courts are in agreement that a noncarrier's acquisition of a railroad line is subject to approval under section 10901, rather than section 11343.

The Railroad Revitalization and Regulatory Reform Act of 1976,[12] precursor of the Staggers Rail Act of

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[12] Public Law 94-210, 90 Stat. 31, *et seq.*

1980,[13] marked a dramatic change in the regulation of the Nation's railroads. Concerned that the rigidities of the time honored regulatory structure hampered the railroads in adjusting to the Nation's changing traffic patterns and responding to the increased competition of the other modes of transportation, the Congress greatly relaxed the regulatory restraints upon the railroads and allowed them considerable leeway to effect mergers and acquisitions, set rates and charges, and implement discontinuances and abandonments.

Discontinuances of service and abandonments of railroad lines continue to require ICC approvals, pursuant to 49 U.S.C. 10903, but such approvals are more readily and speedily attainable than before the statute's amendment. Newly added provisions, 49 U.S.C. 10905, were designed to facilitate the purchase by successor operators of railroad lines that otherwise would be lost to abandonments.

An alternative to the abandonment process is the direct sale of a railroad line to a successor operator. If, as occasionally has occurred, the purchaser of the railroad line is another railroad, the transaction requires the ICC's approval under 49 U.S.C. 11343. If, however, as more frequently has been the case, the acquirer of the railroad line is neither a carrier nor a person in control of a carrier, the purchase is subject to the ICC's approval pursuant to 49 U.S.C. 10901. As the court explained in *Matter of Chicago, M. St. P. & Pac. R. Co.*, 658 F.2d 1149, 1169 (7th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982):

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[13] Public Law 96-448; 94 Stat. 1895, *et seq.*

> Under the Interstate Commerce Act . . ., a distinction is made between non-carrier acquisitions and other purchase transactions which involve two or more existing rail carriers. Such non-carrier acquisitions and the operating authority which follows and which results from abandonment or other line extension is now governed by 49 U.S.C. §§ 10901 and 10903, formerly Section 1(18)-1(20), 49 U.S.C. §§ 1(18)-1(20) (repealed 1978). Transactions involving transfers or sales between two or more existing carriers, normally termed unifications, are governed by 49 U.S.C. § 11343, formerly Section 5(2), 49 U.S.C. § 5(2) (repealed 1978) [footnotes and citations omitted].

It bears noting that the acquisitions under consideration in that case included purchases by two newly formed companies, affiliates of railroad holding companies, that were approved pursuant to section 10901, while the control relationships between them and their parent companies were separately reviewed by the ICC under section 11343.[14]

In the intervening decade this has been a major means by which successor operators have obtained railroad lines that were only marginally profitable for the railroads that had operated them, namely, the purchaser would acquire the railroad line pursuant to 49 U.S.C. 10901, with an application also being filed

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[14] Finance Docket No. 29431, *Potlatch Corporation—Control—St. Maries River R. Co.* (unreported), served April 15, 1981; Finance Docket No. 29198, *Kyle Railways, Inc., et al.—Control—Pend Oreille Valley R. Co.* (unreported), served March 4, 1981.

under 49 U.S.C. 11343 if the purchaser was affiliated with a carrier or person in control of a carrier.[15] Indeed, after reviewing numerous transactions of this kind, in 1985 the ICC in *Class Exemption—Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, supra*, promulgated a class exemption for such section 10901 transactions, pursuant to the provisions of 49 U.S.C. 10505.

Petitioners do not challenge the validity of the section 10901 class exemption procedure. Rather, they maintain that it simply does not apply if the noncarrier purchaser is an affiliate of a railroad holding company; in such a situation, they contend, the acquisition must be considered by the ICC pursuant to 49 U.S.C. 11343 (petition, pp. 12 & 19). Their approach is too simplistic and ignores altogether the ICC's determination upon the evidence of record as to whether the purchaser is in fact an entity separate and distinct from the holding company and, hence, itself not a carrier or person in control of a carrier. Here, of course, the ICC concluded that FRVR and B&P were financially and operationally independent of their affiliates and, therefore, entitled to avail themselves of the section 10901 class exemption procedure (App. 16a, 48a, 65a-66a).[16]

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[15] *Railway Labor Executives' Ass'n v. United States*, 811 F.2d 1327, 1329 (9th Cir. 1987); *Black v. ICC*, 762 F.2d 106, 114 (D.C. Cir. 1985).

[16] The petitioners, at page 18 of their Petition, invite this Court to reweigh the evidence before the agency, a role which it heretofore has declined to assume. *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 535-36 (1946); *Mississippi Valley Barge Co. v. United States*, 292 U.S. 282, 286-87 (1934).

In reaching its conclusions, the ICC applied the indicia of independence formulated in Finance Docket No. 30779, *Rochester & S.R., Inc. and Genesee and W. Indust., Inc.—Exemp. from 49 U.S.C. 10901, 11301, and 11343* (unreported), served July 13, 1986, *aff'd, Railway Labor Executives' Ass'n v. ICC*, 819 F.2d 1173 (D.C. Cir. 1987), and Finance Docket No. 30629, *Staten Is. R. Corp.—Exempt. for 49 U.S.C. 10901; Delaware Otsego Corp. and Staten Is. R. Corp.—Exemp. from 49 U.S.C. 11301* (unreported), served July 18, 1986, *aff'd, Railway Labor Executives' Ass'n v. U.S.* 791 F.2d 994 (2d Cir. 1986). Both cases involved an acquisition of a rail line by a newly created noncarrier affiliate of a railroad holding company, and in both cases the subsidiary received financial assistance from its corporate parent but not to such an extent as to compromise its separate identity and operation. In both cases the reviewing courts upheld the ICC's determinations that the evidence did not require the noncarrier status of the acquiring companies to be disregarded and the purchases to be approved under section 11343, rather than section 10901.

Only recently a third United States court of appeals, in *Brotherhood of Locomotive Engineers v. I.C.C.*, 909 F.2d 909 (6th Cir. 1990), *aff'ing*, Finance Docket No.31187, *SouthEastern Rail Corporation—Acquisition and Operation Exemption—Gulf and Mississippi Railroad* (unreported), served August 31, 1989, came to a similar conclusion. The court, at 914, said:

> We conclude that the ICC properly looked past the corporate shells to the underlying relationships between the companies involved in this transaction and properly determined that MidSouth formed SouthRail for the le-

> gitimate business purpose of acquiring and operating GMR as an independent subsidiary. We further conclude that the ICC properly determined that SouthRail was entitled to invoke a section 10901 class exemption for its acquisition of GMR.

Significantly, in challenging the validity of the lower court's decisions, the petitioners do not discuss, much less distinguish, the foregoing United States courts of appeals decisions upholding the ICC's determinations, similar to the one made herein, that a newly formed noncarrier company may acquire a railroad line under the agency's section 10901 class exemption procedure, notwithstanding that the company was an affiliate of a railroad holding company. Indeed, each of the United States courts of appeals which has been confronted with the issue has agreed with the ICC that a noncarrier's acquisition of a railroad line is appropriate for disposition under section 10901, rather than section 11343, even when the noncarrier is an affiliate of a railroad holding company.

Petitioners instead purport to rely upon four decisions of this Court.[17] None is relevant, much less on point, and the petitioners' assertion, at page 18 of their petition, of a "direct conflict" between the decisions below and the decisions of this Court which they cite is plainly wrong. The issue whether a noncarrier affiliated with a carrier can acquire a railroad line under section 10901, rather than section 11343,

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[17] *Gilbertville Trucking Co. v. United States*, 371 U.S. 115 (1962); *County of Marin v. United States*, 356 U.S. 412 (1958); *Alleghany Corporation v. Breswick & Co.*, 353 U.S. 151 (1957); *United States v. Marshall Transport Co.*, 322 U.S. 31 (1944).

arose in none of them; nor, for that matter, did the issue whether protective conditions must be provided only for the affected employees of the railroads which are party to a section 11343 transaction. The best that can be said of the decisions is that they underscore the breadth of the ICC's jurisdiction, based on the evidence of record before it, to oversee carrier mergers and acquisitions, a matter as to which the decisions below pose no challenge.[18] Here, the ICC, upon consideration of the facts presented and consistent with its practice, deemed the railroad line acquisitions appropriate for its disposition under section 10901, or, alternatively, the class exemption procedure relating thereto, rather than, as petitioners urged, section 11343. That agency choice, based on the evidence before it, scarcely rises to an abuse of the statutory scheme, as petitioners contend.[19]

Petitioners, also, refer to two recent decisions in which the ICC allegedly reached results contrary to

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[18] The cases cited by the petitioners were so unpersuasive to the court below that they were not even discussed in its decisions. The Sixth Circuit, which did address these cases, found them unavailing: "Any relevance that *Marshall* and *Alleghany* have to this issue lies in their holdings that require the ICC to review each proposed transaction on a case-by-case basis to evaluate the nature of the relationships between the parties." *Brotherhood of Locomotive Engineers v. I.C.C.*, *supra*, 909 F.2d at 913.

[19] Indeed, the showing of public convenience and necessity, under 49 U.S.C. 10901, imposes a more rigorous burden of proof upon the applicant than a mere demonstration of no anticompetitive consequences resulting from the proposed transaction, under 49 U.S.C. 11344(d).

those reached herein.[20] In both decisions, however, the ICC specifically held that the companies acquiring the railroad lines, although newly formed, were not to be operated independently but, to the contrary, were to be totally integrated into the operations of their affiliates. The ICC, therefore, concluded that the transactions properly were subject to its approval under section 11343, as the applicants themselves had urged in submitting their transactions for the agency's authorization. In any event, as a reviewing court, the court below did not need to concern itself with the consistency or inconsistency of the ICC's decisions, so long as the ones before it were properly decided.[21]

II.

The courts are in agreement that protective conditions must be afforded only the affected employees of the applicant railroads.

RLEA, although invited by the ICC to do so, elected not to introduce evidence in the reopened section 10901 exemption proceeding as to why, contrary to its usual procedure, the ICC should have provided protective conditions for the employees of the CNW

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[20] Finance Docket No. 31505, *Rio Grande Indus., Inc.—Purchase and Related Trackage Rights—Soo Line Between Kansas City, Mo. and Chicago, Ill.* (unreported), served November 15, 1989; *Rio Grande Indus., Inc.—Purchase and Trackage Rights—Chicago, Missouri & Western Ry. Co.*, 5 I.C.C. 2d 952 (1989). Petitioners, finally, refer to Finance Docket No. 31617, *Chesapeake and Albemarle R. R., Inc.—Lease Acquisition and Operation Exemption—Southern Ry.*, a proceeding which evidently remains pending before the ICC and is yet to be decided by it.

[21] *Virginian Ry. Co. v. United States*, 272 U.S. 658, 665-66 (1926).

affected by the sale of its railroad line to FRVR (*see* App. 44a-45a). Rather, it awaited the ICC's section 11343 approval of the control relationship between FRVR and Itel and Itel Rail to maintain that the CNW's employees should have been included.[22]

Petitioners' argument that a nonparticipant's employees are entitled to protection under section 11347 comes too late. Every United States court of appeals that has considered the issue has upheld the Commission in its construction of section 11347 as requiring protective conditions only for the affected employees of the railroads which were parties to the section 11343 transactions. *Railway Labor Executives' Association v. ICC*, 869 F.2d 1492 (6th Cir. 1989) (list), *aff'ing*, No. 31186, *MidSouth Corp.—Continuance in Control Exemption—South Eastern Rail Corp.* (unreported), served February 12, 1988; *Crounse Corp. v. I.C.C.*, 781 F.2d 1176, 1192 (6th Cir. 1986), *aff'ing*, *CSX Corp.—Control—American Commercial Lines, Inc.*, 2 I.C.C. 2d 490, 557 (1984); *Cosby v. I.C.C.*, 741 F.2d 1077, 1079 (8th Cir. 1984), *rev'ing on other grounds*, *Burlington Northern, Inc.—Control & Merger—St. L.*, 360 I.C.C. 788, 948 (1980); *Southern Pacific Transp. Co. v. I.C.C.*, 736 F.2d 708, 725 (D.C. Cir. 1984), *aff'ing*, *Union Pacific—Control—Missouri Pacific; Western Pacific*, 366 I.C.C. 462, 621 (1982); *Lamoille Valley R. Co. v. I.C.C.*, 711 F.2d 295, 323-24 (D.C. Cir. 1983), *aff'ing*, *Guilford Transp. Industries, Inc.—Control—B&M Corp.*, 366 I.C.C. 294, 344

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[22] In the section 10901 class exemption proceeding involving the B&P's purchase of the CSXT's railroad line, RLEA sought to show why employee protective conditions should be imposed. The ICC, however, deemed such conditions not warranted (App. 70a-74a), a finding unassailed by the petition herein.

(1982); *Missouri-Kansas-Texas R. Co. v. United States*, 632 F.2d 392, 411 (5th Cir. 1980), *aff'ing, Burlington Northern, Inc.—Control & Merger—St. L.*, 360 I.C.C. 788, 948 (1980).

The ICC's construction of the statute as not requiring the extension of protective conditions to employees of railroads not party to the section 11343 transaction long antedated the 1978 recodification,[23] and, therefore, the change from the plural to the singular in the wording of section 11347 to which the petitioners point, at page 23 of their petition, effected no substantive change in the law.

In the proceedings in question CNW and CSX were the sellers of the railroad lines, rather than competitors of the parties to the section 11343 transactions; however, that is a distinction without a difference. As the court below concluded, "None of this [foregoing] reasoning distinguishes employees of competitors from those of non-applicants generally; all of it supports the Commission's contention that CNW's employees are not entitled to the protections of section 11347 for the compelling reason that CNW was not a party to the control proceeding" (App. 10a).

CONCLUSION

In the final analysis, these cases come down to whether the ICC reasonably read the provisions of 49 U.S.C. 10901, 11343 and 11347, entrusted to the agency for their administration. That it did so is manifest; its construction of the statute has been upheld

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[23] *See, Southern Ry Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557, 567 (1962); *Baltimore & O.R. Co. Operation*, 261 I.C.C. 615, 619 (1946).

by each of the United States courts of appeals which heretofore has considered its text. The court below correctly accorded the ICC's decisions the deference they were due. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 840-42 (1984).

WHEREFORE, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: March 15, 1991

APPENDIX

APPENDIX A

Chicago and North Western Transportation Company ("CNW") is a wholly-owned subsidiary of CNW Corporation, which is wholly-owned by Chicago & North Western Acquisition Corporation, which is wholly-owned by Chicago & North Western Holdings Corporation, the majority interest of which is held by Blackstone Capital Partners, L.P., an affiliate of the Blackstone Group. Union Pacific Corporation holds one hundred percent (100%) of the non-voting preferred stock of Chicago & North Western Holdings Corporation.

The subsidiaries of CNW, other than those wholly-owned by it are:

Iowa Transfer Railway Company
Kansas City Terminal Company
MT Properties, Inc.
Peoria & Pekin Union Trailway Company
Trailer Train Company
Transportation Data Exchange, Inc.
ACE Limited
Railroad Association Insurance, Ltd.
Transportation & Railroad Assurance Company, Ltd.
Transportation Quality Systems, Inc.
CNW Realco, Inc.

Fox River Valley Railroad Corporation (formerly FRVR Corporation) is a wholly-owned subsidiary of Itel Rail Corporation (except for one-tenth of one percent of the shares owned by directors of FRVR), which itself is a wholly-owned subsidiary of Itel Corporation, a publicly-held company.

The direct and indirect subsidiaries of Itel Corporation, other than those directly or indirectly wholly-owned by it are:

DCN Acquisition Corporation
Green Bay and Western Railroad Company

McCloud River Railroad Company
North American Trailing Company
The Ahnapee and Western Railway Company
Impac of New Jersey, Inc.
Interstate Bi-Modal, Inc.

CSX Transportation, Inc. ("CSXT") is a wholly-owned subsidiary of CSX Corporation ("CSX"). The subsidiaries of CSXT, other than those wholly-owned by it, are:

The Akron & Barberton Belt Railroad Company
The Akron Union Passenger Depot Company
Allegheny and Western Railway Company
Augusta and Summerville Railroad Company
The Baltimore and Cumberland Valley Railroad Extension Company
Beaver Street Tower Company
Belt Railway Company of Chicago
The Central Railroad Company of South Carolina
Central Transfer Railway and Storage Company
Chatham Terminal Company
Clearfield and Mahoning Railway Company
Chicago and Western Indiana Railroad Company
The Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
Delaware and Bound Brook Railroad Company
The Home Avenue Railroad Company
The Lakefront Dock and Railroad Terminal Company
Nicholas, Fayette and Greenbrier Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
North Charleston Terminal Company
Paducah & Illinois Railroad Company
Richmond-Washington Company, which has a subsidiary, RF&P Corporation
Terminal Railroad Association of St. Louis
Trailer Train Company
Winston-Salem Southbound Railway Company
Woodstock & Blockton Railway Company